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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY YBARRA, Defendant and Appellant.	E048005 (Super.Ct.No. SWF017061) OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik and F. Paul Dickerson III, Judges. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Mark Anthony Ybarra guilty of felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1))[1] (count 1); altering the identification marks on a firearm (§ 12094) (count 2); and felon in possession of ammunition (§ 12316, subd. (b)(1)) (count 4).[2] Defendant thereafter admitted that he had served a prior prison term (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)).[3] As a result, defendant was sentenced to a total term of 25 years to life in state prison. On appeal, defendant contends (1) the trial court erred in denying his suppression motion, and (2) the trial court abused its discretion in declining to strike one of his prior strike convictions. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND[4]

At approximately 10:25 p.m., on June 25, 2006, Murrieta City Police Officer Chivington was dispatched to a condominium complex in response to a call regarding potential shots fired. Upon arrival, Officer Chivington made contact with a female (later

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury found defendant not guilty of willfully discharging a firearm in a grossly negligent manner (§ 246.3) as alleged in count 3.

[3] Prior to trial, the court struck a third prior strike allegation.

[4] The factual background is taken from the suppression hearing. The facts relevant to the denial of defendant's motion to strike one of his prior strike convictions will be recounted in the argument addressing that claim.

identified as defendant's wife), "standing out by a truck that was reported to be possibly related" to unit No. 12-24, the subject of the call. In response to whether she heard any gunshots fired, defendant's wife stated she did not hear anything. Officer Chivington believed she had been drinking alcohol, but he determined that she was capable of conversing with him and understanding the conversation. At Officer Chivington's request, she left the parking lot and went into her residence, unit No. 12-24.

At some point, Officer Chivington went to unit No. 12-24, knocked on the door, and spoke with defendant's wife. Defendant's wife conversed with the officer freely and said she had heard fireworks. There were no other officers present, but they were en route to the location. Officer Chivington informed her that he had information that individuals might be injured, that there may have been gunshots that came from her condominium, and that he wanted to conduct a welfare check. Officer Chivington asked her whether he could enter the condominium. Specifically, he "asked her if there was anything in the condo that we should be concerned with and if it was okay for us to make sure that there was nothing in there that we should be concerned with." Defendant's wife's initial response was "'[t]here's nothing in here,'" and she granted consent for the officers to enter, but she asked to be kept informed of what was going on.

Officer Chivington entered the condominium with Corporal Whiddon. Officer Chivington searched the front portion while Corporal Whiddon searched the rear. At some point, Corporal Whiddon brought Officer Chivington into the master bedroom and showed him gun cleaning kits on the floor near the bed. He also noted some mail

addressed to defendant. He further observed a pair of men's swim trunks, which appeared to be wet and crumpled near a gun cleaning kit.

In the living room, Officer Chivington found a black plastic case he recognized as a gun case underneath a couch. The gun case was visible and in plain view. It was partially sticking out from underneath the couch. A handgun revolver was found inside the gun case.

Defendant's wife testified on behalf of the defense. She claimed that the first time she saw the officers on the day of the incident was when they knocked on the front door of her condominium. She opened the door about two feet, and stood in the doorway with her hand on the knob. Three or four officers then entered into the condominium, yelling, "'Where is he?'" Defendant's wife asserted that she did not give the officers permission to enter or come in and search the condominium and that the officers never asked for permission to search her condominium. She further claimed that at some point in time she was placed in a chair on the balcony, in handcuffs, and left there for about 20 minutes. She also stated that she had been drinking prior to the officers' arrival.

In rebuttal, Officer Chivington testified that when he spoke with defendant's wife at the door of her condominium, he was not looking for a suspect.

Following arguments from counsel, the trial court denied defendant's motion to suppress evidence. The court found Officer Chivington to be more credible than defendant's wife. The court further determined that defendant's wife had expressly and voluntarily given consent to the officers to enter the condominium and that once the

officers found the gun case, they had a duty to open it to determine whether it contained a gun.

II

DISCUSSION

A. *Motion to Suppress Evidence*

Defendant argues that the trial court erred in denying his suppression motion because the officers only had consent to conduct a welfare check of the residence and did not have authority to open the gun case.

In ruling upon a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. (*People v. Needham* (2000) 79 Cal.App.4th 260, 265.) In evaluating a challenge to the trial court's ruling on a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling and defer to its factual findings, whether express or implied, if they are supported by substantial evidence. We then exercise our independent judgment to decide what legal principles are relevant, independently apply them to the facts, and determine as a matter of law whether there has been an unreasonable search and/or seizure. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748 [104 S.Ct. 2091, 80 L.Ed.2d 732].) The

warrant requirement is not absolute, however, and the presumption of unreasonableness that attaches to a warrantless entry into one's home is overcome in a few "'specifically established and well-delineated'" circumstances. (*People v. Thompson* (2006) 38 Cal.4th 811, 817-818.) The prosecution always bears the burden of justifying the search by proving the search fell within a recognized exception to the warrant requirement. (*People v. James* (1977) 19 Cal.3d 99, 106.)

A knowing and voluntary consent to search allows an officer to forgo obtaining a warrant. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222 [93 S.Ct. 2041, 36 L.Ed.2d 854]; *People v. Superior Court* (*Walker*) (2006) 143 Cal.App.4th 1183, 1198.) And a warrant is not necessary when "exigent circumstances" exist, requiring swift action and leaving no time to obtain a warrant before entering a residence. (*People v. Frye* (1998) 18 Cal.4th 894, 989, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, a warrant need not be obtained when there is probable cause to believe the entry is justified by the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or other persons inside or outside the house. (*Minnesota v. Olson* (1990) 495 U.S. 91, 100 [110 S.Ct. 1684, 109 L.Ed.2d 85]; *People v. Thompson, supra,* 38 Cal.4th 811, 818.) A warrant also may not be required when an emergency arises while officers "'are not engaged in crime-solving activities,'" but are performing "'community caretaking functions,'" such as when officers are "'respond[ing] to requests of friends and relatives and others for assistance when people are concerned about the health, safety

or welfare of their friend, loved ones and others.'" (*People v. Ray* (1999) 21 Cal.4th 464, 471-472 (lead opn. of Brown, J.) (*Ray*).)

Here, substantial evidence demonstrates that defendant's wife gave the officers consent to enter her condominium after being informed by Officer Chivington that he had "information that there may be individuals injured, that there may have been gunshots that came from the apartment," and that he wanted to conduct a welfare check. Specifically, Officer Chivington asked defendant's wife "if there was anything in the condo that [the officers] should be concerned with and if it was okay for [the officers] to make sure that there was nothing in there that we should be concerned with." She replied, "'[t]here's nothing in here,'" and gave the officers consent to enter but asked that she be kept informed of what was occurring. Upon entry into the condominium, the officers found, in plain view, gun cleaning kits and a gun case. Under the plain view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [113 S.Ct. 2130, 124 L.Ed.2d 334].) Hence, the seizure of these items was valid.

Defendant's reliance on *Ray*, *supra*, 21 Cal.4th 464, is misplaced. In that case, the police officers were dispatched to a residence at 3:30 p.m., based on information that "'the door has been open all day and it's all a shambles inside'" and that "'[i]t's unknown if anyone's home but the [person reporting] doesn't think so.'" (*Id*. at p. 468.) When the officers arrived, they figured "they had encountered a burglary or similar situation."

(*Ibid*.) The officers repeatedly knocked and announced their presence, but no one responded. The officers conducted a security check to see if anyone inside might be injured, disabled, or unable to obtain help and to determine whether a burglary had occurred or was in progress. No one was inside the residence, but the officers observed a large quantity of cocaine and money in plain view. (*Ibid*.) A warrant was obtained and the seizure of those items led to charges against the defendant. (*Id*. at pp. 468-469.)

In *Ray*, the trial court granted the defendant's motion to suppress. (*Ray, supra*, 21 Cal.4th at p. 469.) The Court of Appeal reversed, finding the record established "'the officers reasonably suspected that an exigency existed requiring their immediate warrantless entry,'" noting that "'the officers were acting properly in their roles as community caretakers and had done nothing wrong.'" (*Id*. at pp. 469-470.)

Our high court, addressing the appellate court's apparent conflict between the exigent circumstances and community caretaking exceptions to the proscription against warrantless searches, explained that the community caretaking exception (of which emergency aid is a subcategory) is distinct from the exigent circumstances exception. (*Ray, supra*, 21 Cal.4th at p. 471.) The court noted, "'[T]he defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police.' [Citation.] Upon entering a dwelling, officers view the occupant as a potential victim, not as a potential suspect." (*Ibid*.) In conclusion, the court found the officers' conduct met the community caretaking exception and affirmed the appellate court's reversal of the trial court's decision to grant defendant's motion to suppress. (*Id*. at pp. 477-478, 480.)

This case does not involve entry into a residence based on either the community caretaking exception or the exigent circumstance exception. The officers here entered the residence after defendant's wife had given them consent to enter the residence.

Defendant argues that the officers exceeded the scope of the consent when they opened the gun case. The United States Supreme Court has explained that the scope of consent is measured by an objective reasonableness requirement. Whether a search is reasonable is a factual determination under the totality of the circumstances. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? . . . [¶] The scope of a search is generally defined by its expressed object. [Citation.]" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251 [111 S.Ct. 1801, 114 L.Ed.2d 297]; see also *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.)

Here, there was an understanding between defendant's wife and the officers that they could enter her premises to conduct a welfare check. The scope of the consent to search was thus a limited one. The officers therefore exceeded that scope by opening the gun case without securing a search warrant. There is insufficient evidence to support the trial court's finding that defendant's wife's consent to enter her residence to conduct a welfare check included the opening of the gun case.

Nonetheless, we find that the gun would have been inevitably discovered pursuant to the inevitable discovery exception to the exclusionary rule. "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been

discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.'" (*People v. Robles* (2000) 23 Cal.4th 789, 800 (*Robles*), quoting *Murray v. United States* (1988) 487 U.S. 533, 539 [108 S.Ct. 2529, 101 L.Ed.2d 472].) The purpose of the exception is "to prevent the setting aside of convictions that would have been obtained without police misconduct." (*Robles*, at p. 800.)

It is the prosecution's burden to "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," in order for the doctrine to apply. (*Nix v. Williams* (1984) 467 U.S. 431, 444 [104 S.Ct. 2501, 81 L.Ed.2d 377].) In that event, the deterrence rationale underlying the exclusionary rule would have "so little basis that the evidence should be received." (*Ibid*.) "The test, as to the likelihood of eventual discovery, is not one of certainty, but rather of a reasonably strong probability. [Citations.]" (*People v. Huston* (1989) 210 Cal.App.3d 192, 221.)

In this case, as defendant points out in his reply brief, the People did not raise the inevitable discovery argument below. Notwithstanding this omission, "the inevitable discovery doctrine . . . may be applied on appeal if the factual basis for the theory is fully set forth in the record." (*Robles, supra*, 23 Cal.4th at p. 801, fn. 7; see also *People v. Boyer* (2006) 38 Cal.4th 412, 449 [appellate court found inevitable discovery doctrine

justified denial of suppression motion, even though the prosecution had not raised it in the trial court].)

Here, while it is true that the prosecution failed to raise the issue in the trial court, the record does indicate that evidence presented at the suppression hearing supports the inevitable discovery exception. Officer Chivington responded to a call of shots fired from defendant's condominium. Officer Chivington approached the condominium, knocked on the door, and spoke with defendant's wife. Officer Chivington informed her that he had information that individuals might be injured, that there may have been gunshots fired from her condominium, and that he wanted to conduct a welfare check. Officer Chivington asked defendant's wife if he could enter the condominium, and she granted consent. The officers were justified in entering the condominium without a warrant because defendant's wife gave consent to enter. After the entrance, the officers discovered, in plain view, gun cleaning kits and a gun case. Under the plain view doctrine, these items may be properly seized. (*Minnesota v. Dickerson, supra,* 508 U.S. at p. 375.) The trial court noted that the officers would have been "derelict in their duties had they not opened the case to determine what was in there." Based on the above evidence, a search warrant inevitably would have been issued. (*People v. McDowell* (1988) 46 Cal.3d 551, 564.) The evidence, thus, is sufficient to meet the prosecution's "burden of proving by a preponderance of the evidence that evidence otherwise unlawfully obtained would have been inevitably discovered." (*People v. Superior Court* (*Walker*), *supra,* 143 Cal.App.4th at p. 1217.)

We, therefore, find no error in the trial court's denial of defendant's motion to suppress evidence.

B. *Motion to Strike Priors*

Defendant argues the trial court abused its discretion by refusing to dismiss one of his two remaining prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. We disagree.

A trial court's decision whether or not to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at pp. 376-377.)

The California Supreme Court explained, "In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation

in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Carmony*, *supra*, 33 Cal.4th at p. 378.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, 17 Cal.4th at p. 161.) A decision to dismiss a strike allegation based on its remoteness in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Here, the record is clear that defendant had not led a crime-free life following his strike convictions. We cannot conclude that the trial court abused its discretion in declining to strike one of defendant's prior strike convictions. The relevant considerations supported the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows that the court was aware of its discretion,

aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*.

This case is far from extraordinary. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Even though defendant's current crimes can be characterized as nonviolent, defendant does have a violent and serious prior record of criminal behavior beginning in 1993. Defendant has accumulated numerous misdemeanor and felony convictions, as well as parole and/or probation violations. The trial court here could not overlook the fact defendant continued to commit serious criminal offenses and violate the terms and conditions of his parole and/or probation, even after serving time in prison. His conduct as a whole was a strong indication of unwillingness or inability to comply with the law. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant.

There is no indication from the record here that the trial court failed to consider the relevant factors or that it failed to properly balance the relevant factors or that it abused its discretion in determining that defendant was not outside the spirit of the three strikes law. (*Williams*, *supra*, 17 Cal.4th at p. 161.) Thus, we cannot say that the trial court abused its discretion when it declined to dismiss one of defendant's prior strike convictions.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.